

Dr Soon Tiong Kiong v Public Prosecutor

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HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 41-236 OF 1998

KAMALANATHAN RATNAM J

8 MAY 2002

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Criminal Law — Storing of psychotropic substances — Whether non authorized person had access to drugs — Poisons (Psychotropic Substances) Regulations 1989 reg 24(2)

Criminal Procedure — Judgment — Double judgment — Magistrate gave oral judgment before delivering written judgment, whether existence of two judgments

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The defendant was at all material times a registered medical doctor licensed to practise medicine in Malaysia. He was charged with three counts. At the close of the case for the prosecution, the learned magistrate acquitted and discharged the defendant on the first and second charges and called upon the defendant to answer the third charge. The learned magistrate then found the defendant guilty of the third charge and sentenced him to a fine of RM1,500 in default three months imprisonment. The defendant having paid the fine and being dissatisfied with the said decision, appealed.

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Held, dismissing the appeal:

- (1) The only judgment that was legally before the court was the 'signed copy of the grounds of decision on the case', and that no doubt was the written judgment of the court dated 18 December 1998 (see p 719E-F).
- (2) The relevant regulation to consider was reg 24(2) of the Poisons (Psychotropic Substances) Regulations 1989. It stated quite clearly that 'any room, cabinet, safe or receptacle used to store any psychotropic substance shall only be locked and unlocked by the person authorized ...'. The important word here was the disjunctive 'or'. This would mean that the defendant would have been quite at liberty to have shown that the said drugs were kept in the room which was locked and to which he or the person authorized by him, had the key too. However, in this case, the undisputed evidence was that the drugs were kept in a cabinet and that the lock to the said cabinet was spoilt. Once the defendant had taken upon himself the duty of storing the said drugs inside a cabinet then notwithstanding the fact that the room was locked, it was the duty of the defendant to keep the cabinet locked. In the circumstances since the cabinet was not locked the defendant in this case was rightly convicted. The prosecution had clearly proved that a stranger, other than the doctor and his nurse, had access to the said drugs (see pp 718C-E, 719B-C).

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A [Bahasa Malaysia summary]

Defendan pada setiap masa matan adalah seorang doktor perubatan yang berdaftar untuk mengamal perubatan di Malaysia. Beliau disabitkan dengan tiga pertuduhan. Di penutup kes pendakwa raya, majistret yang arif telah membebaskan dan melepaskan defendan atas pertuduhan pertama dan kedua dan memanggil defendan menjawab pertuduhan ketiga. Majistret yang arif kemudian telah mendapati defendan bersalah atas pertuduhan ketiga dan menjatuhkan hukuman ke atas beliau dengan denda RM1,500 jika gagal tiga bulan penjara. Defendan setelah membayar denda tersebut dan berasa tidak puas hati dengan keputusan tersebut, membuat rayuan.

Diputuskan, menolak rayuan tersebut:

- (1) Satu-satunya penghakiman yang sah di hadapan mahkamah adalah ‘salinan alasan-alasan keputusan kes yang telah ditandatangani’, dan tanpa sebarang keraguan, ini merujuk kepada penghakiman bertulis mahkamah bertarikh 18 Disember 1998 (lihat ms 719E–F).
- (2) Peraturan yang relevan yang perlu dipertimbangkan adalah peraturan 24(2) Peraturan-Peraturan Racun (Bahan-Bahan Psikotropik) 1989. Ia menyatakan dengan nyata bahawa ‘mana-mana bilik, kabinet, peti besi atau wadah yang digunakan untuk menyimpan apa-apa bahan psikotropik hendaklah hanya dikunci dan dibuka oleh seseorang yang diberi kuasa ...’. Perkataan yang penting di sini adalah perkataan ‘atau’ yang disjunktif. Ini bermaksud bahawa defendan bebas untuk menunjukkan bahawa dadah tersebut telah disimpan di dalam bilik yang berkunci dan di mana beliau atau seseorang yang dibenarkan oleh beliau, memiliki kuncinya. Namun begitu, di dalam kes ini, keterangan yang tidak boleh dipertikaikan adalah bahawa dadah tersebut disimpan di dalam kabinet dan kunci kepada kabinet tersebut telah rosak. Apabila defendan telah mengambil tanggungjawab untuk menyimpan dadah tersebut di dalam sebuah kabinet maka meskipun pada hakikatnya bilik tersebut berkunci, ia adalah tanggungjawab defendan untuk mengunci kabinet tersebut. Dalam keadaan berikut, memandangkan kabinet tersebut tidak berkunci defendan dalam kes ini telah disabitkan dengan betul. Pihak pendakwaan dengan nyata telah membuktikan bahawa seseorang yang tidak dikenali, selain daripada doktor dan jururawat beliau, boleh mendapat dadah tersebut (lihat ms 718C–E, 719B–C).]

Notes

For cases on double judgment, see 5 *Mallal’s Digest* (4th Ed, 2001 Reissue) paras 1886–1888.

Legislation referred to

Criminal Procedure Code s 307(3)

Poisons Act 1952 Poison List Order 1993

Poisons (Psychotropic Substances) Regulations 1989 regs 3(2)(b) 24(1)

*Karpal Singh (PS Rajan & Co) for the appellant.**Azman Abu Hassan (Deputy Public Prosecutor) for the respondent.***Kamalanathan Ratnam J:***Facts*

The defendant was at all material times a registered medical doctor licensed to practice medicine in Malaysia. He was charged with three counts. They read as follows:

Pertuduhan pertama

Bahawa kamu pada 14 Jun 1993 lebih kurang jam 7 malam di Klinik MC Yoko Cawangan Lee Klinik beralamat 7-G Rifle Court, Jalan Padang Tembak Air Itam di dalam Daerah Timur Laut di dalam negeri Pulau Pinang, sebagai tuan punya klinik tersebut, telah didapati membekalkan, melalui seorang pekerja bernama AH Kamal Ahmad, sejenis racun berjadual (Bahagian 1 Kumpulan B) kepada seorang yang bernama Muhammad Nasir bin Ahmad No K/P 5909920, yang tidak dibekalkan oleh seorang pengamal perubatan berdaftar seperti dikehendaki di bawah s 21(1)(b), dibaca bersama dengan s 19(1)(a) Akta Racun 1952 yakni:

Satu paket plastik mengandungi 12 tablets oren mengandungi Erythromycin iaitu sejenis antibiotik (perkara 43 di bawah Perintah Senarai Racun 1993).

Dengan ini kamu telah melanggar s 21(1)(b) dibaca bersama s 19(1)(a) Akta Racun 1952, satu kesalahan di bawah s 13(b) dan boleh dihukum di bawah s 32(2), Akta yang sama.

Pertuduhan kedua

Bahawa kamu pada 14 Jun 1993 lebih kurang jam 7 malam di Klinik MC Yoko Cawangan Lee Klinik beralamat 7-G Rifle Court, Jalan Padang Tembak, Air Itam di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, sebagai tuanpunya Klinik tersebut, telah didapati membekalkan melalui seorang pekerja bernama AH Kamal Ahmed, sejenis racun berjadual (Bahagian 1 Kumpulan C), kepada seorang yang bernama Muhammad Nasir bin Ahmad No K/P 5909920, yang tidak dibekalkan sebagai ubat dispens oleh seorang pengawal perubatan berdaftar seperti dikehendaki di bawah s 22(b), dibaca bersama dengan s 2(1) Akta Racun 1952 yakni:

Satu botol plastik mengandungi cecair perang gelap mengandungi Diphenhydramine, suatu anti-histamine (perkara 45 di bawah Perintah Senarai Racun 1992) dan Codein yaitu sejenis narkotik (perkara 432 di bawah Perintah Senarai Racun 1993).

Dengan ini kamu melanggar s 22(b) dibaca bersama s 2(1) Akta Racun 1952, satu kesalahan di bawah s 13(b) dan boleh dihukum di bawah s 32(2) Akta yang sama.

- A** Pertuduhan ketiga
- Bahawa kamu pada 14 Jun 1993 lebih kurang jam 7 malam di Klinik MC Yoko Cawangan Lee Klinik beralamat 7-G Rifle Court, Jalan Padang Tembak, Air Itam di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, sebagai pengamal perubatan berdaftar yang diberi kuasa di bawah peruntukan 3(2)(b) Peraturan-Peraturan Racun (Bahan-bahan Psikotropik) 1989 PU(A) 66; telah didapati menyimpan bahan-bahan psikotropik dalam kabinet yang tidak berkunci yang terletak di dalam bilik doktor di dalam premis tersebut yakni:
- B**
- 14 perkara seperti di Lampiran A.
- Dengan ini kamu telah melanggar peraturan 24(1), Peraturan-Peraturan Racun (Bahan-bahan Psikotropik) 1989, satu kesalahan di bawah s 30(5) Akta Racun 1952 dan boleh dihukum di bawah seksyen yang sama.
- C**

Lampiran
Pertuduhan

Lampiran A

D	Bil	Tanda barang	Nama Ubat	Nama racun berjadual	Nombor senarai racun	Kuantiti
	1	3	Ativan 0.5mg	Lorazepam	197	178
	2	4	Ativan 0.5mg	Lorazepam	197	144
E	3	5	Dormicum 15mg	Midazolam	197	80
	4	6	Spasril	Chloridiazepoxide	197	262
	5	7	Dormicum 7.5mg	Midazolam	197	68
F	6	8	Somese 0.25mg	Triazolam	197	100
	7	9	Somese 0.25mg	Triazolam	197	44
	8	11	Panbesy	Phenterbitone	507	225
G	9	12	Phenoberbitone	Phenoberbitone	57	165
	10	13	Clorpo-5 Tablet	Chlordiazepoxide	197	832
	11	14	Diazeparo tablet 10mg	Diazepam	197	114
H	12	15	Diazepam tablet 10mg	Diazepam	197	825
	13	16	Valium 2	Diazepam	197	35
	14	17	Ziazepam 10	Diazepam	197	214
I	Per: 14 sahaja					

At the close of the case for the prosecution, the learned magistrate acquitted and discharged the defendant on the first and second charges and called

upon the defendant to answer the third charge. After the defendant had elected to give his evidence under oath and after hearing lengthy submissions, the learned magistrate found the defendant guilty of the third charge and sentenced him to a fine of RM1,500 in default three months' imprisonment. The defendant having paid the fine and being dissatisfied with the said decision, appealed. At the appeal, the defendant was represented by Mr Karpal Singh. Whilst the previous solicitors for the defendant had filed 23 grounds in their petition, Mr Karpal in his customary forthrightness, and in my view quite correctly too, only proceeded with two grounds namely:

- (1) that the learned magistrate having given an oral judgment on 16 November 1998 with a certified written transcript being made available, also gave a written judgment on 18 December 1998, thereby making available two judgments;
- (2) that whilst the cabinet in which the psychotropic drugs were kept was not locked, the consultation room in which the said cabinet and in which the drugs were, was locked and that therefore the defendant had not committed any offence pursuant to reg 24(1) of the Poisons (Psychotropic Substances) Regulations 1989 ('the Regulations').

Findings of this court

To sustain a conviction under the charge as preferred, the learned magistrate quite correctly set out the four ingredients the prosecution had to prove, ie:

- (1) that the defendant was a registered medical practitioner authorized to keep or store psychotropic drugs;
- (2) that Clinic MC Yoko Cawangan Lee Klinik of 7-G-1 Rifle Court, Jalan Padang Tembak, Air Itam, Penang is the place of practice of the defendant, Dr Soon Tiong Kiong ('the clinic');
- (3) that the 14 items listed in Schedule A to the charge are psychotropic drugs;
- (4) that the defendant had kept or stored the said psychotropic drugs in an unlocked cabinet in the consultation room in the said clinic.

In respect of the first two ingredients, the prosecution called En Rahim bin Abdul Rahman who at the material time, was the Secretary to the Malaysian Medical Council ('the MMC'). This witness tendered to court exhs P60A and B which was the Government Gazette Jil 37 No 15 and dated 29 July 1993 which said Gazette stated the defendant as the sole practitioner at the clinic. The prosecution also tendered through the investigating officer the practising certificate issued to the defendant by the MMC for the relevant period between 1 January 1993 to 31 December 1993 and this certificate stated that the defendant's main practice was at the clinic. Once this was established, then pursuant to reg 3(2)(b) of the Regulations the defendant is authorized to be in possession of psychotropic drugs.

It is pertinent to set out the relevant Regulations relating to the charge under the Regulations.

A Regulation 3 reads as follows:

(1) No person shall have in his possession any psychotropic substance unless —

(a) he is authorized to be in possession of such psychotropic substance under these Regulations; and

B (b) the psychotropic substance in his possession is —

(i) for a lawful purpose; and

(ii) obtained in accordance with the provisions of these Regulations.

C (2) For the purposes of para (a) of sub-reg (1), the following persons or class of persons shall be authorized to be in possession of psychotropic substances:

(a) ...

(b) a registered medical practitioner;

(c)–(k)...

(l) a person lawfully supplied with such psychotropic substance —

D (i) by a registered medical practitioner, registered dentist Division 1 or a veterinary surgeon; or

(ii) in accordance with a prescription lawfully given by a registered medical practitioner, registered dentist Division 1 or a veterinary surgeon;

(m) a person acting on behalf of the class of persons mentioned in para (1)....

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Regulation 24 reads as follows:

(1) Any person who possesses any psychotropic substance for the purposes of manufacturing, dispensing, compounding, mixing, sale, supply, education, research or chemical analysis, shall store such psychotropic substance in a room, cabinet, safe or receptacle which shall remain locked except in so far as may be necessary to have such room, cabinet, safe or receptacle opened in order to —

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(a) carry out the purposes described above in connection with the psychotropic substance stored therein,

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(b) keep other psychotropic substance in such room, cabinet, safe or receptacle; or

(c) conduct a stock check of the psychotropic substance stored therein.

(2) Any room, cabinet, safe or receptacle used to store any psychotropic substance shall only be locked and unlocked by the person authorized to possess such psychotropic substance and the keys to such room, cabinet, safe or receptacle shall be kept by him only.

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(3) For the purposes of this regulation, any room, cabinet, safe or receptacle used for storing any psychotropic substance shall be so constructed and with reasonably sufficient security measures in order to prevent theft or diversion of the psychotropic substance stored therein.

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Corrigendum

Poisons Act 1952

Poisons (Psychotropic Substances) Regulations 1989

In PU(A) 66 published on 2 March 1989, substitute for the words '(1)' appearing in sub-para 3(2)(m) the words '(l)'.

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[KK(S)-484 SK-10 Bhg 3; PN(PU) 172/V]

On the third issue as to whether the 14 items listed in Sch A accompanying the charge were psychotropic drugs, the evidence of SP4, the government chemist, established without challenge that the items stated in Sch A were substances falling within the items listed under the Poisons List Order 1993 of the Poisons Act 1952.

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On the fourth issue, it was Mr Karpal's contention that whilst the cabinet in which the said drugs were kept was not locked as the lock was spoilt, yet the consultation room in which the cabinet was, was locked, because the defendant had testified that when he left for the day he had locked his room.

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The relevant regulation to consider with regard to this submission is reg 24(2). It states quite clearly that 'any room, cabinet, safe or receptacle used to store any psychotropic substance shall only be locked and unlocked by the person authorized ...'. The important word here is the disjunctive 'or'. This means that the defendant would have been quite at liberty to have shown that the said drugs were kept in the room which was locked and to which he or the person authorized by him, had the key too. However, in this case, the undisputed evidence was that the drugs were kept in a cabinet and that the lock to the said cabinet was spoilt. Once the defendant had taken upon himself the duty of storing the said drugs inside a cabinet then notwithstanding the fact that the room was locked, it is the duty of the defendant to keep the cabinet locked. In the circumstances, since the cabinet was not locked, the defendant in this case was rightly convicted.

D**E**

However, in this case, could it be said that the consultation room was indeed locked. Although the defendant testified that he had a key and his nurse Chan ('SP6') had the other key, yet when Muhammad Nasir bin Ahmad ('SP1'), the agent provocateur, was shown into the consultation room by SP6, he met with one AH Kamal Ahmad ('AH') who acted as the doctor and who prescribed medication to SP1. The said AH, however, did not attend court.

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It is very pertinent to remember that the defence did not deny the existence of AH. Since AH was seated in the consultation room and was prescribing medication and acting as a doctor, the learned magistrate was correct in calling upon the defendant to enter his defence and to explain why AH was seated in his consultation room. If the said AH was a doctor registered with the MMC and issued with a practising certificate, then the defendant has a valid defence. When called upon to enter his defence, the defendant's case collapsed like a deck of cards. It was suggested to the investigating officer during cross examination by the defendant's counsel that the clinic was owned by MC Yoko Management Sdn Bhd. However, in his evidence, he admitted that the clinic was his principal place of practice in 1993. There were suggestions by the defence counsel that there were other doctors working in the said clinic. However, under cross examination the defendant admitted that Dr Soon Thong Khoo and Dr Soon Thong Oon did not practice in the said clinic as 'their proper place of practice'.

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A The defendant admitted that he knew AH but denied under oath that the said AH was working for him. However, the defendant totally failed to explain what AH was doing in his own consultation room and dispensing medication to patients. Further, when asked why he had left his clinic open after he had locked his room and gone when there was no doctor present, he said that he was contactable at all times.

B With such preponderance of evidence and because of the lack of explanation forthcoming from the defendant as to the presence of AH in his room, which said room was open, and since the cabinet containing the psychotropic drugs are in the unlocked cabinet, the prosecution had clearly proved that a stranger, other than the doctor and his nurse, had access to the said drugs. In the circumstances, the doctor was rightly convicted.

C The other issue I have to consider is whether there were two judgments in this case. Admittedly, the learned magistrate had delivered an oral decision on 16 November 1998, the day he delivered his verdict. Subsequently, he gave a written judgment on 18 December 1998.

D The learned deputy public prosecutor referred the court to s 307(3) of the Criminal Procedure Code ('the CPC') which reads as follows:

E When a notice of appeal has been lodged the court appealed from shall make a signed copy of the grounds of decision in the case and cause the same to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.

F It is clear to me therefore that the only judgment that is legally before the court is the 'signed copy of the grounds of decision on the case', and that, no doubt, is the written judgment of the court dated 18 December 1998. Sometimes courts do, in the interest of justice, like in this case, explain to a party concerned why he had lost the case. Needless to say, whilst this is a noble gesture in that at least the litigant would know why he had lost, yet at times this might act adversely even against the winning party because an appellate court might hold the view that since there are two judgments the appeal ought to be allowed, and in a civil case, the claim might even be dismissed. However, in this case, as soon as the learned deputy raised s 307(3) of the CPC, Mr Karpal Singh, with his customary frankness which he is known for, informed the court that he was 'not making much of this issue'.

G **H** I therefore dismissed the appeal and upheld the conviction and sentence.

Appeal dismissed.

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Reported by Peter Ling